

Public Defender News



Chief's Corner

Special points of interest:

- *Ability to Pay and Preservation of the Record*
- *Communications Meetings*
- *Success Stories*
- *The Importance of Confidentiality*



[Public defenders] have caseloads that are too overwhelming, insufficient resources with which to do their jobs, and they work in environments that pressure them to process cases efficiently. But that does not mean they are not successful. Every day that they do everything they can to close the gap between what clients deserve and what the system tolerates, they are successful. At times, theirs may be the only voice reminding the system of our most sacred ideals. That is when the voice is most valuable.

Jonathan Rapping, Redefining Success as a Public Defender: A Rallying Cry for Those Most Committed to Gideon's Promise, *The Champion* (June 2012), at 36.

I want to share a narrative in which the defense attorney's voice resonated as a powerful reminder of the values which guide our way. During a bond hearing in a Michigan state court, the judge began to question the accused, Mr. Whale, about his drug use. Whale's attorney, Scott Millard, objected to the court's inquiry. As the hearing proceeded, Millard maintained his position and sought to protect his client's rights, despite the judge's sarcastic and increasingly hostile responses (the full transcript may be found at *In re Post*, 2013 Mich. LEXIS 670 (Mich. May 1, 2013)):

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THE COURT: Mr. Whale, when was the last time that you used controlled substances? Let me have the date, please, sir.

MR. MILLARD: Your Honor, Mr. Whale has a Fifth Amend--

THE COURT: I'm not charging him with use of controlled substance, counsel. He's not charged with that charge. I'm interested in getting a clean, honest bond response. Now, if you don't want to do that, you can leave; your call.

MR. MILLARD: Your Honor, Mr. Whale has a Sixth Amendment right to assist--effective assistance of counsel.

THE COURT: That's right. And that's not what he's getting at the moment.

MR. MILLARD: Your Honor, I--I strongly disagree with that. I've--

THE COURT: I'm glad.

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MR. MILLARD: Your Honor, I think--I think it would be entirely reasonable to set Mr.--

THE COURT: I'm not interested in what you think. Haven't you gotten that yet?

MR. MILLARD: I have gotten that.

THE COURT: I really am not.

MR. MILLARD: And I understand that. And, Your Honor, the Court fully certainly has the right to not care what I say.

THE COURT: Thank you. Then be quiet.

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Appellate News

By Wade Zolynski, Chief Appellate Defender



The court cannot impose fines, fees, or costs without first determining the defendant has the ability to pay those amounts.

Are Your Clients Being Ordered to Pay Fines, Fees, and Costs Without the Court Inquiring into Ability to Pay? If So, Preservation of the Record is Key.

In *State v. Yarlott* (DA 12-0014), Assistant Appellate Defender Eileen Larkin argued that the district court's order requiring Yarlott to pay costs of counsel (pursuant to 46-18-113) and costs of prosecution (pursuant to 46-18-232) was unconstitutional. Eileen also argued the district court failed to investigate Yarlott's ability to pay before ordering costs. The Supreme Court issued an order in *Yarlott*, rather than an opinion. In that order the Court acknowledged the district court's failure "to investigate Yarlott's ability to pay or specify the amounts imposed." (DA 12-0014, 5/21/13 order at 3.) As a result the Court remanded the case back to district court for a hearing on Yarlott's ability to pay. However, the Court dismissed, without prejudice, Yarlott's constitutional issues.

In dismissing of the constitutional issues, the Court stated "Yarlott has failed to properly preserve his constitutional challenges for appeal." Trial counsel had argued "that the constitution guarantees Court-appointed counsel and that he shouldn't have to actually pay for Court-appointed counsel if he cannot afford it." (DA 12-0014, 5/21/13 order at 4.) This argument, the Court reasoned, lacked specificity because "no specific discussion of the constitutional grounds for the objection followed." (DA 12-0014, 5/21/13 order at 3.) Per precedent, an "objection must be specific in order to preserve the issues for appeal . . . an objection that is very general in nature and which does not specify what authority, rule, statute, or constitutional provision might be violated . . . is insufficient." (DA 12-0014, 5/21/13 order at 3.)

The constitutional issues raised in *Yarlott* are too involved to properly address in this newsletter. But, the Court's preservation analysis applies to statutory ability to pay arguments as well. A specific objection or argument is required. The Office of the Appellate Defender has compiled a list of specific statutory authority that can be used when an OPD client is ordered to pay fines, fees, and/or costs without the court inquiring into the defendant's ability to pay.

1. **Generally.** The Court cannot impose fines, fees, or costs without first determining the defendant has an ability to pay those amounts.
2. **Costs of Counsel.** MCA § 46-8-113(4) prohibits the imposition of costs of counsel unless the court has first found the defendant is or will be able to pay those costs. The court must take into account the financial resources of the defendant and the nature of the burden that payment of costs will impose. MCA § 46-8-113(3) requires the court to personally question the defendant about his ability to pay.
3. **Jury, Prosecution, and Other Trial Costs.** MCA § 46-18-232(2) prohibits the imposition of trial costs unless the court has first found that the defendant is or will be able to pay those costs. The court must consider "the financial resources of the defendant, the future ability of the defendant to pay costs, and the nature of the burden that

May we be of service? Make yourself at home.



The Missoula office isn't quite sure whether they should expand into the homeless shelter business just yet, but they are evidently being seen as a full service office.

Microsoft Lync

Starting in FY14, we will have a new software product from Microsoft called Lync. Lync is a real-time communications software that allows you to instant message, have voice/video conferences and even share your screen or applications with others throughout OPD. You can also setup meetings with external parties that are not on the state network and they can join meetings without installing software by simply using their web browser.

More news to come in the near future!

<https://mine.mt.gov/it/pro/unifiedcommunications/default.mcpx>

Change to Cigna Making You Crazy?

Health Care and Benefits Division and Cigna representatives have been touring the state to give an update on the switch to Cigna. There were quite a few glitches along the way, but most of them have been solved, including in-network providers being incorrectly identified as out-of-network, providers sending claims to the wrong place, urgent care/ER copay issues and others.

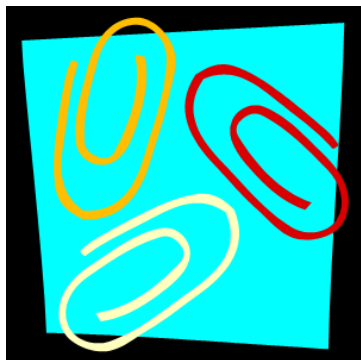
If there is an upcoming presentation in your town, you are encouraged to attend. If you missed your local presentation, here are a few key points:

- ◆ Prior authorizations are now required for many services. Check with your provider or contact Cigna to find out if you need one.
- ◆ When you call the Cigna number on your membership card (855-692-0131) be sure to follow the automated prompts, which will direct you to the nice group of people in Visalia, CA administering the State of Montana plan. Don't press zero! You will end up with someone who has no information about our specific plan and will probably give you incorrect information.

- ◆ There is now a dedicated email address to reach that same group at Cigna: stateofmontana@cigna.com.
- ◆ Go to <http://benefits.mt.gov/wellness.mcpx> for information on all of the wellness programs available to us through Cigna, CareHere, and HCBBD, including stress management, weight loss, tobacco cessation and more.
- ◆ CareHere has replaced It Starts With Me to do our health screening. Directions for registering are on the wellness page (above).
- ◆ CareHere will offer only basic health screening at no charge at the traveling events. The extra tests that ISWM offered for a fee will no longer be available. If you have access to a CareHere clinic, however, your provider may order additional tests at no charge.



If you have unresolved Cigna issues, or for more information, contact HCBBD at benefitsquestions@mt.gov or 800-287-8266.



*“The art of
communication is
the language of
leadership”
— James Humes*

Big Changes to Office Supply Ordering

The State’s new purchasing system (“eMarket”) will launch on July 1, 2013, replacing the Eway and Central Stores systems that have been in place for several years. None of the existing information from Eway will translate to the new system, but will have to be recreated in eMarket, including shopping lists and favorites.

It will be an interesting transition since our users will not have had a chance to test it before launch. Please be patient as the State Procurement folks work the kinks out, and plan ahead as much as possible to make the change easier on your support staff. Also, please be aware that these are exclusive contracts, and “outside” or local shopping will no longer be allowed.

Communications Meetings

Our endeavor to improve communication throughout OPD and ensure consistency statewide has materialized in the form of regular “communications meetings.” Office managers statewide and central services staff have begun to meet on a regular basis to share, discuss, and deliberate information and issues that may be pertinent to other regions within the agency. Anyone who may be interested is welcome to join and raise any relevant topic for discussion. If you have any questions or would like further information please contact Jessie Reehl (jreehl@mt.gov) or Bekki Downing (rdowning@mt.gov), or 406-496-6080.

Chris Thomas, Bozeman, is on a mission to visit every office as part of the project to improve the indigency determination process. Furthest stop, Glendive! Ronda Hansen not only spent the morning with Chris, but took her to a great Mexican place for lunch. Thanks to Ronda and all of the other offices on the itinerary so far for your time and valuable feedback.



GIDEON'S
ARMY

In April, Region 4 deputy public defender Jenny Kaleczyc lined up a special showing of the award-winning HBO documentary *Gideon's Army*. The documentary tells the story of three public defenders who “struggle against long hours, low pay and staggering caseloads so common that even the most committed often give up in their first year.” A crowd of almost 200, including legislators and judges, attended the screening, and the local newspaper printed an article which discussed the documentary and the plight of Montana’s public defenders.

Gideon's Army is required viewing for anyone interested in public defense, and I urge everyone to tune it later this summer when it airs on HBO.

Appellate News

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*If the district court
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payment of costs will impose.” Regarding jury costs, the Montana Supreme Court recognized in *State v. Moore*, 2012 MT 95, that United States and Montana Constitutions mandate an ability to pay determination to prevent chilling the right to jury trial.

4. **Fines.** MCA § 46-18-231(3) prohibits the imposition of a fine unless the court has first found that the defendant is or will be able to pay the fine. The court must consider “the nature of the crime committed, the financial resources of the offender, and the nature of the burden that payment of the fine will impose.”
5. **Surcharges.** MCA § 46-18-236(2) requires the court to waive the 46-18-236(1) surcharges if the court has determined under MCA 46-18-231(3) or 46-18-232(2) that the defendant is unable to pay a fine or to pay other costs.
6. **Court Information Technology Surcharge.** MCA § 3-1-317(2) authorizes the court to waive the surcharge if the defendant is unable to pay the surcharge.
7. **PSI Fee.** MCA § 46-18-111(3) prohibits imposition of a PSI fee if the defendant is unable to pay the fee within a reasonable time.
8. **Restitution.** Per MCA § 46-18-246, at any time a defendant may request the sentencing court adjust or waive payment of restitution. MCA § 46-18-241 permits the sentencing court to order the defendant to complete community to satisfy restitution when the defendant lacks the ability to pay due to circumstances beyond the defendant’s control.

If the district court fails to have a hearing or assesses fines, fees, and costs regardless of ability to pay you may have an appellate issue. In order to preserve that issue for Montana Supreme Court review, you must bring the defendant’s inability to pay to the district court’s attention using specific legal authority cited above. You may use other authority you find appropriate as well.

PLEASE NOTE: If the defendant does have the ability to pay fines, fees, and/or costs, the court must, on the record, indicate it finds the defendant able to pay. Please remind the court of that duty in order to prevent unnecessary appeals.

The above statutory citations will help you address *statutory* ability to pay issues at the trial court level. If you wish to preserve the more complex *constitutional* issues with regard to payment of fines, fees, and cost, feel free to contact our office for assistance at 406-444-9505.

Information Security Program

OPD is required by §2-15-114, MCA, to implement an Information Security Program. Part of this program is to provide employees with information security awareness training. We have decided to deliver this training in an online format through the SANS organization.



This training is MANDATORY for all employees. Implementation will be office by office. You will be notified by email when the training is available to you and the expected completion date. Each topic varies between 2 and 5 minutes in length with a total length of about an hour. You can do the training all at once or you can break it up. Completion will be tracked in the software and you must complete each of the training topics assigned.

For more information, contact your local IT support, or Kyle Belcher, IT Supervisor.

Chief's Corner

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*... there are days
when, as Rapping
notes, yours is "the
only voice"
reminding the
system of the
fundamental ideals,
and that is when
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valuable.*

MR. MILLARD: However, Your Honor, I--

THE COURT: Be quiet. Thank you very much. Mr. Whalen--Whale. Excuse me. Mr. Whale, when was the last time that--the date that you last used controlled substances, sir?

MR. MILLARD: Your Honor, can we--

THE COURT: One more word, and I'm going to hold you in contempt. The first thing that I do when I hold somebody in contempt is I will give you a fine. The second thing I do, if you're in contempt again, is I'll remand you to jail. I don't want to do that, counsel.

*

THE COURT: Counsel, will you be quiet?

MR. MILLARD: I--I--I cannot be quiet to this Court's insist--

THE COURT: One hundred dollars in contempt of Court the first sanction.

Now, if you want to keep going, you name it, because we're going to do it by the days. I don't particularly want to go there. But you're more than welcome to help me. Mr. Whale--

MR. MILLARD: Your Honor, you're insisting that he make an admission. He has a Fifth Amendment right not to make an admission.

THE COURT: This is your second warning. I don't give a third. You make the call. And if you go, you're going to be there for the whole weekend. You make the call. Mr. Whale, when was the last time you used controlled substances?

MR. MILLARD: Your Honor--

THE COURT: Counsel, I'm holding you in contempt of Court. Remand him to the jail. Mr. Whale, we'll be back here on Monday morning. Mr. Whale, we'll be back here on Monday morning, and we'll do this again, with your attorney here to represent you. I want you here at 8:00 o'clock Monday morning. We're adjourned.

Mr. Millard was taken out of court in handcuffs and spent several hours in custody. Later that day, a different judge reversed the contempt citation. The judge who held Millard in contempt later was publicly censured and suspended for his comments during the hearing.

I hope that none of you find yourselves confronting a similar dilemma of effectively and appropriately defending your client's rights at the risk of a possible contempt conviction. Still, there are days when, as Rapping notes, yours is "the only voice" reminding the system of the fundamental ideals, and that is when our role is most valuable.

Success Stories

We have two notable victories to mention. Tom Schoenleben in Havre successfully obtained a dismissal with prejudice of seven counts of official misconduct, when the court granted his motion to dismiss based on jurisdictional grounds. The acts were alleged to have occurred on land which the county school district owned, but which was within the boundaries of the Fort Belknap Indian Reservation. Dispositive issues addressed in the briefs included whether the alleged acts fell within the federal statute defining "Indian country," application of the Assimilative Crimes Act, and federal/state preemption under Public Law 280.

Ashley Morigeau, with help from Leta Womack, represented a person charged in Polson with counts of assault with a weapon and aggravated assault. The jury returned a not guilty verdict on the aggravated assault charge, and convicted only on a lesser offense of misdemeanor assault.

Chief's Corner

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The Montana Supreme Court has recognized that the duty of confidentiality is correlative to an attorney's duty of loyalty, which is "perhaps the most basic of counsel's duties."

Legislative Update

The Montana Legislature included in House Bill 2 an appropriation to provide additional funds to our attorney career ladder. The Legislature also passed House Bill 13, which will provide a pay increase for state employees. We are working with AFSCME in negotiations to implement these funding provisions.

Reminder of the Need to Maintain Confidentiality of Client Information.

Wade Zolynski and I recently learned that a private citizen has requested that OPD staff access and disclose client information entered in JustWare. I want to remind everyone that information about our clients – in the trial courts and on appeal – is confidential. Looking up information about a client in JustWare and providing that information to anyone, without proper prior authorization, is inappropriate, and willful disregard of this admonition will result in discipline, up to and including termination.

The Montana Supreme Court has recognized that the duty of confidentiality is correlative to an attorney's duty of loyalty, which is "perhaps the most basic of counsel's duties." *State v. Jones*, 278 Mont. 121, 125 (1996). The duty of confidentiality continues even after the attorney-client relationship has ended. Every person in the agency is obligated to maintain the confidentiality of our clients' personal information. Policy 535 spells out this obligation. Paragraph 3.1 sets out our obligation to respect the confidential nature of information:

OPD clients and employees are entitled to a high degree of confidence that information furnished to the agency is protected against unauthorized use, inspection or disclosure. Thus, employees handling confidential or sensitive information must always exercise caution.

Paragraph 3.2 specifically bars unauthorized disclosure of client information:

Employees can not disclose confidential information regarding clients to anyone except the client, unless the client has completed a signed Release, the Release is on file with the Office of the State Public Defender, and the employee has obtained approval from either the supervisor or the client's assigned attorney. This includes, but is not limited to, family members, current or former spouses, significant others, individuals claiming to have power of attorney, and friends.

I trust that we will all be extremely cautious in handling our clients' information.

Bill

In Case You Missed It . . .

The June/July issue of the *Montana Lawyer* had a great OpEd on the importance of public defense by Mark Parker, a Billings attorney and State Bar president-elect. He says that "Public defenders are lawyers at their absolute best. It is pure lawyering."

He gave a special shout out to OPD's Moira D'Alton and Roberta Drew ". . . public defenders that get in there and fight, fight, fight."

The article is available on the State Bar website at <http://www.montanabar.org/displaynewsletter.cfm> (select the June/July issue from the drop down menu).

OFFICE OF THE STATE PUBLIC DEFENDER

44 W. PARK
BUTTE, MT 59701
Phone: 406-496-6080
Fax: 406-496-6098



ENSURING EQUAL ACCESS
TO JUSTICE STATEWIDE

The Office of the State Public Defender is responsible for statewide public defender services, including appellate representation, provided through local offices and the Office of the Appellate Defender.

The mission of the Office of the State Public Defender is to ensure equal access to justice for the State's indigent and those who are statutorily entitled to services in civil cases, as well as to provide appellate representation to indigent clients.

William F. Hooks is the Chief Public Defender for the State of Montana. Wade Zolynski is the Chief Appellate Defender. Both are appointed by the Public Defender Commission, currently chaired by Fritz Gillespie. For more information, please visit our website, www.publicdefender.mt.gov.

Policy Changes!

You probably noticed as you completed the annual policy review that numerous policies have recently been updated. Chief Hooks has notified us of others, especially in relation to closing cases. If you have any questions on specific changes, please contact Central Services.



As usual, a good time was had by all at the annual support staff conference! Thanks to AFSCME for great door prizes!

